Chiles, and the serious wounding of "Pepsi" Greene. Pet. App. 5a-6a; Gov't C.A. Br. 10.

2. At trial, "Pepsi" Greene and another underling, Denise Berkley, testified as eyewitnesses to petitioner's fatal stabbing of Moody. C.A. App. 4423-4432, 4492, 5272-5277, 5294-5300, 5304. "Papoose" Davis testified that he had provided a pistol to petitioner shortly before the murder and that petitioner and Tipton had said that they "got him" and that it was "hot" on the street when they visited his house immediately after the murder. *Id.* at 4623-4626. Another co-conspirator, Sterling Hardy, testified that he had overheard a jailhouse conversation between petitioner and Tipton in which they were trying to determine the identity of a woman to whom they gave a knife. *Id.* at 4916-4918.

In addition to impeaching both Greene and Berkley, C.A. App. 4485-4495, 5292-5304, petitioner's trial counsel presented evidence suggesting that Moody had been murdered by someone other than petitioner. For example, Gina Taylor, a neighbor of Moody's, testified that she saw a short, thin person stabbing Moody in the alley outside his house. Although she could not identify the person, she testified that the assailant could not have been petitioner because of his diminutive size. *Id.* at 5626-5631, 5636. A police detective confirmed that Taylor had described the killer as a short, thin black male during an interview soon after the murder. *Id.* at 5652-5654. Another police detective testified that he had been told by Moody's mother that a person named Keith had been looking for her son shortly before he was murdered; that some of Keith's friends had broken into her house a week earlier, armed with automatic weapons; and that her son was hiding from a person named Maurice on the day he was killed. *Id.* at 5655-5656,

5659-5660. Based on the information obtained from Moody's mother, the detective testified, the initial focus of the investigation had been on "Little Keith" Barkley, a small-featured black male (*id.* at 5652-5655), but the focus changed, according to the detective, once "Pepsi" Greene gave her account of the murder a few weeks later. Petitioner did not testify.

3. On direct appeal, the court of appeals addressed various challenges to the district court's instructions on the CCE charge, including a claim that the jury should have been advised that it "must be unanimous as to which three (at least) predicate violations each [defendant] committed and which five (at least) persons each [defendant] supervised." *Tipton*, 90 F.3d at 885. The court of appeals noted that none of the defendants had "requested a 'special unanimity' instruction on these two elements," and that none had "objected to the court's failure to give one sua sponte." *Ibid.* The court therefore reviewed the claim "only for plain error," and it found "none warranting correction." *Ibid.* The court held that, assuming "a special unanimity instruction is required, upon request, as to the predicate violation element," the defendants "could have suffered no actual prejudice" from the lack of one, because "the jury unanimously found each [defendant] guilty of at least five predicate violations: the conspiracy charged in Count 1, the drug possession charged in Count 32, and at least three of the § 848(e) murders." *Ibid.* As to "a special unanimity instruction on the five supervisees element," the court of appeals held that "none is required." *Ibid.*

4. After the affirmance on direct appeal, petitioner filed a Section 2255 motion collaterally attacking his convictions and sentences, including his capital convic-

tion and death sentence for the Moody murder. C.A. App. 332-339. As relevant here, petitioner alleged that his trial counsel performed deficiently by inadequately investigating and defending the Moody murder charge. *Id.* at 384-386. In support of that allegation, petitioner made an evidentiary proffer (1) that Demetris Rowe, a purported eyewitness to Moody's murder, had stated that the murder was committed by Johnson and Tipton and that petitioner was not present; (2) that petitioner had informed one of his trial counsel, David Baugh, before trial that he was at a Richmond motel at the time Moody was killed and that a woman (Carmella Cooley) could account for his presence at the motel; (3) that Baugh had interviewed, but had not called as a witness, the woman identified by petitioner, and had attempted to obtain, without success, corroborating motel records; and (4) that petitioner's Section 2255 investigator had found a motel receipt from a Howard Johnson's motel in Richmond, showing that "Larry Chiles," of 1016 Clay Street, checked into the motel for an overnight stay on January 12, 1992 (the night of Moody's murder) and that "Linwood Chiles," also of 1016 Clay Street, checked into the same motel for an overnight stay on January 2, 1992. See *id.* at 467, 1168-1173, 2110-2111.

At an evidentiary hearing on the ineffective-assistance claim, petitioner testified that, although he supported himself through drug trafficking in January 1992 (C.A. App. 2141, 2144) and associated with Tipton, Johnson, and other members of the conspiracy, he had not been involved in Moody's murder. According to petitioner, he and co-defendant Sandra Reavis[6] spent

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[6] Reavis was tried with petitioner, Tipton, and Johnson. She is currently serving a 16-year sentence on a drug-trafficking conspiracy

the night Moody was murdered together at a Howard Johnson's motel in Richmond, and petitioner did not learn about Moody's murder until they checked out the next morning. *Id.* at 2149, 2160-2161. Petitioner testified that, on the evening of January 12, Linwood Chiles drove petitioner, Reavis, and Carmella Cooley (a friend of Reavis's) to the motel, and Chiles rented a room with cash provided by petitioner. According to petitioner, Chiles and Cooley departed shortly thereafter, but petitioner and Reavis remained in the motel room until check-out time the next morning. *Id.* at 2152-2160, 2166-2167, 2169. Petitioner testified that he told Baugh he had not killed Moody, but instead had been at the motel with Reavis, Cooley, and Chiles. *Id.* at 2161-2162, 2165-2166.

Reavis corroborated petitioner's alibi, testifying that Chiles and Cooley had taken petitioner and her to the motel around 9:00 p.m. on January 12, and that she and petitioner had spent the entire night together at the motel. C.A. App. 2126-2128. Reavis testified that she could clearly recall the events of that evening because the Richmond police had initially charged her as a participant in Moody's murder. *Id.* at 2128. Reavis conceded, however, that she had not told the police during an interview shortly after the murder that she and petitioner were in a motel at the time of the murder or that Chiles and Cooley knew of her and petitioner's whereabouts on the night of the murder. *Id.* at 2130-2131, 2133.

Baugh testified that petitioner had told him before trial that he was at a motel, in the company of Reavis,

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conviction. See *United States* v. *Reavis*, 48 F.3d 763 (4th Cir.), cert. denied, 515 U.S. 1151 (1995).

Chiles, and Cooley, on the night of the murder, and that Chiles rented the room. C.A. App. 2176-2178, 2178d. Baugh testified that he had visited the motel in an attempt to locate corroborating records, but was unable to find any. *Id.* at 2176-2178, 2178b. Baugh also interviewed Cooley before trial, but recalled that "she was not cooperative or * * * helpful," that her attitude "border[ed] on hostile," and that "she couldn't give [him] a date" to corroborate an alibi. *Id.* at 2178. Baugh testified that he would have subpoenaed Cooley "[i]f she had provided * * * a solid, corroborable alibi," but, based on his interview, he decided not to call her as a defense witness. *Id.* at 2178n-2178o.

Baugh also testified that he would have done things differently at trial if he had had the receipt showing that "Larry Chiles" had rented a room at the motel on January 12. While acknowledging that "there [we]re problems" with the fact that the motel receipt bore another person's name, Baugh said that the receipt could have provided "some kind of objective confirmation" that would have permitted petitioner to testify about his whereabouts on the night of Moody's murder. C.A. App. 2178d-2178e, 2178q-2178r, 2178v. Although he did not know whether he could have "put [petitioner] there [at the motel] on th[at] date," Baugh testified that the records would at least have given him "a good starting point to determine some form of corroboration." *Id.* at 2178v-2178w.

Finally, Demetris Rowe gave her account of the Moody murder. She testified that she had been sitting on a porch across from the alley in which Moody was murdered for much of the evening, drinking "pints of gin" with a friend. C.A. App. 2178y-2179. According to Rowe, she heard loud hollering and the sounds of a fight

coming from the house where Moody lived, and then saw Moody emerge from the doorway of the house while struggling with Johnson. *Id.* at 2179-2181, 2184-2185. Rowe testified that she also saw "Pepsi" Greene, Curt Thorne ("Pepsi" Greene's boyfriend and later a murder victim of Tipton and Johnson), Tipton, and an unknown person emerge from the house. *Id.* at 2180-2185. Rowe said that petitioner was not in the group, and that she had seen petitioner and Reavis leave together in a taxi cab at approximately 8:30 p.m. *Id.* at 2181-2182, 2187-2183, 2190.

5. The district court granted petitioner Section 2255 relief. Pet. App. 44a-63a. Concluding that his trial counsel had been deficient in failing to locate the motel receipt and that petitioner had been prejudiced as a result, the district court vacated petitioner's convictions and sentences on the three counts related to the Moody murder (Counts 5, 6, and 7), including his death sentence on the Section 848(e) murder count.[7]

a. The district court explained that defense counsel relied on a misidentification theory for the Moody murder, suggesting that Moody had been killed by someone other than petitioner. Pet. App. 48a-49a. Counsel did not present an alibi defense, even though, as the district court found, petitioner told counsel that he had not killed Moody, that he and Reavis had spent the night in a motel near the location where Moody was murdered, and that the couple had been accompanied to the motel by Carmella Cooley and Linwood Chiles, the

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[7] In a separate opinion, the district court rejected petitioner's claims that were unrelated to the Moody murder and denied the Section 2255 motions filed by Tipton and Johnson in their entirety. Pet. App. 64a-190a.

latter of whom had driven the group to the motel and rented the room for cash. *Id.* at 49a.

The district court found that counsel had investigated petitioner's claimed alibi to some extent. The court found that Baugh had interviewed Cooley, who recalled having accompanied petitioner and Reavis to the motel on one occasion but could not recall the exact date, and that Baugh had "concluded that Cooley's ignorance of the date and her apparent hostility made her a bad defense witness." Pet. App. 50a. The court also found that Baugh had "contacted the Howard Johnson's and asked if the hotel had a record of Linwood Chiles renting a room on January 12, 1992," and that, after being told that it did not, Baugh "went to the hotel and attempted to find such a record himself." *Ibid.*

The court found, however, that Baugh had "limited his search to looking for a record of a room rental under the name of Linwood Chiles for the night of January 12, 1992," and that Baugh could locate no such record. Pet. App. 50a. By contrast, petitioner's Section 2255 investigator had been able to locate a "Larry Chiles" motel receipt for the night of January 12, 1992, after only a few hours of searching through archived records at the motel. *Id.* at 50a-51a. The court found that Baugh "could have located the same documents" if he "had subpoenaed the records" or "spent three hours looking through the hotel records." *Id.* at 51a. Had Baugh discovered the motel records, the court found, petitioner "would have testified consistent with his [exculpatory] testimony at the evidentiary hearing." *Ibid.* And based on petitioner's "demeanor and the details of his account," the court found that petitioner's "testimony that he was at a hotel at the time of the Moody murder, although not compelling, was tenable." *Id.* at 52a.

b. Applying the legal standard in *Strickland* v. *Washington*, 466 U.S. 668 (1984), to the facts that it found, the district court concluded both that trial counsel had been constitutionally deficient in failing to locate the motel receipt and that it was reasonably probable that the jury's verdict on the counts related to the Moody murder would have been different but for trial counsel's deficient investigation. Pet. App. 54a-59a.

In concluding that counsel had performed deficiently, the court explained that counsel had "substantial information" indicating that petitioner's "claim that he was at a hotel at the time of the Moody murder was credible," and therefore "had every reason to believe the hotel records would provide objective evidence to corroborate [petitioner's] story." Pet. App. 55a. Although the court "d[id] not doubt counsel's testimony that he called the hotel a couple of times and on one occasion went to the hotel to find the records," the court determined that "reasonably competent counsel would have filed a subpoena demanding all records held by the hotel pertaining to a Mr. Chiles for January of 1992 or spent a few hours going through all the records at the hotel to assure himself that no records corroborative of his client's alibi existed." *Id.* at 56a. The court thus held that trial counsel's failure to locate the motel records and to present an alibi defense was "attributable to the unreasonably limited amount of time and resources counsel devoted to looking for corroborative hotel records." *Id.* at 57a.

In concluding that counsel's deficient performance had prejudiced petitioner, the district court acknowledged that the evidence of petitioner's guilt was "strong," and that the motel receipt was only "somewhat," "indirectly," and "marginally" corroborative of

the asserted alibi, which was itself "thin." Pet. App. 57a-58a. The court nevertheless concluded that petitioner's thin alibi defense would have sufficiently bolstered the misidentification defense to create a reasonable probability of acquittal on the Moody murder counts. *Id.* at 58a.[5]

6. The court of appeals reversed the district court's grant of Section 2255 relief as to the Moody murder counts and affirmed the district court's denial of petitioner's other claims for relief. Pet. App. 1a-43a.

a. With respect to the Moody murder counts, the court of appeals held that the district court had "erred in concluding that [defense counsel's] representation of [petitioner] was deficient under the first prong of *Strickland*." Pet. App. 39a-40a. The court of appeals agreed that counsel "had reason to believe that the hotel records could generate an alibi for [petitioner]," and that he "was therefore obligated to make a reasonable investigation of them." *Id.* at 40a. Assessing the reasonableness of counsel's investigation without "the distorting effects of hindsight" and with "a heavy measure of deference to counsel's judgments," *id.* at 41a (quoting *Strickland*, 466 U.S. at 689, 691), however, the court of

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[5] The district court rejected petitioner's other ineffective-assistance claim, which was based on his counsel's failure to call Rowe as a witness. Pet. App. 54a. The court found that, to the extent that it exculpated petitioner, Rowe's testimony "was not credible and would carry no weight with a jury." *Id.* at 53a. The district court also rejected petitioner's claim that he was "actually innocent" of Moody's murder. *Id.* at 59a-63a. The court concluded that petitioner's "thin alibi, even when coupled with Gina Taylor's testimony, and the evidence suggesting third parties wished to do Moody harm, [wa]s not sufficiently compelling to preclude many a reasonable juror from finding [petitioner] guilty of murdering Moody in light of the formidable direct and circumstantial evidence of [petitioner's] guilt." *Id.* at 62a.

appeals determined that counsel's "performance was constitutionally reasonable and thorough," *id.* at 42a. The court explained that

> [David Baugh] interviewed Carmella Cooley, who could not remember when she stayed at a hotel with [petitioner]. He called the hotel and requested records of Linwood Chiles from the *only relevant night*—the night of the murder. And when that search was not fruitful, he went to the hotel and searched for the records himself. Only after this final step in the investigation did Mr. Baugh turn to and focus on [petitioner's] misidentification defense.

Ibid. "In these circumstances," the court of appeals "decline[d] to act as a Monday-morning quarterback and second-guess Mr. Baugh's efforts, simply because we are now armed with more information and the benefit of hindsight." *Ibid.* The court noted that "this case does not involve a situation where counsel neglected to investigate, or where his investigation was so cursory that we can now—eleven years on and with the benefit of hindsight— declare it constitutionally unreasonable." *Id.* at 42a-43a.

Quoting the Sixth Circuit, the court of appeals pointed out that "what the lawyer did not miss is 'just as (or more) important as what the lawyer missed.'" Pet. App. 43a (quoting *Coe* v. *Bell*, 161 F.3d 320, 342 (6th Cir. 1998), cert. denied, 528 U.S. 842 (1999)). And what petitioner's trial counsel did do, the court said, he did in a "diligent and highly effective" manner. *Ibid.* In particular, Baugh

> conferred with [petitioner], * * * investigated the crime scene, * * * located an eyewitness to

> the Moody murder who provided a physical description of a murderer dissimilar to [petitioner], * * * learned that Moody's mother had advised the police that another man had been searching for Moody hours before his murder, and * * * aggressively and professionally cross-examined the Government's witnesses.

Ibid. In short, the court explained, petitioner's counsel investigated the "weak" alibi defense and elected to "put on a strong misidentification defense" only "when the [alibi] investigation proved unfruitful." *Ibid.*

The court of appeals also expressed "considerable doubt" that petitioner was prejudiced by counsel's failure to discover the motel receipt. App., *infra*, 2a n.15.[9] The court explained that the district court had found the testimony of all three of the government's witnesses to the Moody murder to be "credible and corroborated by physical evidence," but had found the testimony of petitioner's potential alibi witnesses to be "much less credible." *Ibid.* In light of those credibility determinations, the court of appeals said that

> [i]t would be difficult for this [alibi] testimony (not to mention the fact that [petitioner] would have been subject to cross-examination about the other murders and his extensive criminal record), plus one motel receipt, in someone else's name, placing [petitioner] a mere two miles away from

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[9] Footnote 15, in which the court of appeals elaborates on its "considerable doubt," is omitted from the opinion that is reprinted in the appendix to the petition. Compare Pet. App. 40a with 378 F.3d 382, 409 & n.15 (4th Cir. 2004). The section of the opinion that discusses petitioner's ineffective-assistance claim, including footnote 15, is reproduced in an appendix to this brief.

> the murder scene, to create a reasonable probability that, but for the lack of such evidence, "the results of the proceeding would have been different."

Ibid. (quoting *Strickland*, 466 U.S. at 689).

b. In otherwise affirming the district court's decision, Pet. App. 13a-39a, the court of appeals rejected petitioner's claim for relief based on the district court's failure to give, *sua sponte*, a special unanimity instruction on the three or more predicate acts composing the "continuing series of violations" required for conviction under the CCE statute. *Id.* at 19a-20a. The court of appeals noted that it had assumed on direct appeal what *Richardson* v. *United States*, 526 U.S. 813 (1999), subsequently held—namely, that there is a unanimity requirement—but had concluded that petitioner and his co-defendants were not entitled to relief under the plain-error standard because the jury "unanimously found each guilty of at least five predicate violations." Pet. App. 19a (quoting *Tipton*, 90 F.3d at 885). The court went on to say that a *Richardson* instructional error is "a procedural defect rather than a structural one," and reiterated that petitioner could not have been prejudiced by the error in light of the jury's unanimous verdicts finding him guilty of more than a sufficient number of predicate violations to satisfy the "continuing series of violations" requirement. *Id.* at 20a.[10]

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[10] The court of appeals also rejected Johnson and Tipton's claim that the district court erred by failing to give a special unanimity instruction with respect to the identities of the "five or more other persons" that each of them organized, supervised, or otherwise managed during the course of the CCE. Pet. App. 20a-21a. "Not only has this claim been inexcusably defaulted by Johnson and Tipton's failure to raise it either at trial or on direct appeal," the court said, the claim also fails on the

ARGUMENT

1. *Richardson* v. *United States*, 526 U.S. 813 (1999), holds that jurors must agree on the three or more predicate acts that constitute the "continuing series of violations" element, see 21 U.S.C. 848(c)(2), of a CCE offense. While neither petitioner nor his co-defendants requested a jury instruction to that effect, petitioner contends (Pet. 13-17) that, for two independent reasons, the failure to give such an instruction was reversible error. The court of appeals correctly held otherwise, and its decision does not conflict with the decision of any other court of appeals. Further review is therefore unwarranted.

a. Petitioner argues (Pet. 16-17) that the instructional error was a structural error that requires automatic reversal. This Court has denied petitions that raise the same claim, see *Monsanto* v. *United States*, 125 S. Ct. 153 (2004) (No. 03-10349); *Dean* v. *United States*, 532 U.S. 943 (2001) (No. 00-6619), and there is no reason for a different result here.

In *Richardson*, the Court reserved the question whether the failure to give a unanimity instruction on the "continuing series of violations" element in a CCE case was amenable to harmless-error review. 526 U.S. at 824. The Court has since made clear, however, that an instruction that "omits an element of the offense" altogether "does not *necessarily* render a criminal trial fundamentally unfair," and that such an error is therefore subject to harmless-error analysis. *Neder* v.

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merits, because "*Richardson* did not change the rule 'that the jury need not unanimously agree on which five persons were organized, supervised, or managed by the defendant.'" *Ibid.* (quoting *United States* v. *Stitt*, 250 F.3d 878, 886 (4th Cir. 2001), cert. denied, 535 U.S. 1074 (2002)).

United States, 527 U.S. 1, 9 (1999). As petitioner acknowledges (Pet. 17), every court of appeals to consider the question has therefore recognized that an instruction that merely omits the unanimity requirement with respect to an element of the CCE offense cannot be categorized as structural.[11] As one of those courts has explained, "[b]ecause *Richardson* errors affect only the way the jury is instructed on an element of the offense, they do not taint the trial 'from beginning to end' or undermine 'the framework within which the trial proceeds.'" *United States* v. *Montalvo*, 331 F.3d 1052, 1057 (9th Cir. 2003) (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309-310 (1991)), cert. denied, 541 U.S. 1011 (2004).

b. In the alternative, petitioner argues (Pet. 13-16) that this Court should grant certiorari to resolve an asserted circuit conflict on how harmless-error analysis applies to *Richardson* claims. Like the court below, however, every other court of appeals to consider the question has concluded that a *Richardson* error is harmless where, as here, the jury found the defendant guilty of three or more predicate offenses that are suf-

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[11] See, *e.g.*, *United States* v. *Rivera*, 347 F.3d 850, 851-852 (10th Cir. 2003), cert. denied, 540 U.S. 1210 (2004); *United States* v. *Montalvo*, 331 F.3d 1052, 1056-1057 (9th Cir. 2003), cert. denied, 541 U.S. 1011 (2004); *Ross* v. *United States*, 289 F.3d 677, 681-682 (11th Cir. 2002) (per curiam), cert. denied, 537 U.S. 1113 (2003); *Santana-Medero* v. *United States*, 260 F.3d 133, 139 (2d Cir. 2001), cert. denied, 534 U.S. 1083 (2002); *Lanier* v. *United States*, 220 F.3d 833, 838-839 (7th Cir.), cert. denied, 531 U.S. 930 (2000); *United States* v. *Brown*, 202 F.3d 691, 699 (4th Cir. 2000); *United States* v. *Long*, 190 F.3d 471, 476 n.3 (6th Cir.), cert. denied, 528 U.S. 1032 (1999); *United States* v. *Escobar-de Jesus*, 187 F.3d 148, 161-162 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000).

ficient to satisfy Section 848's "continuing series of violations" element.[12]

It is true, as petitioner points out (Pet. 14-15), that some courts have explicitly addressed the "relatedness" of the predicate offenses as part of the harmless-error analysis.[13] But there is no indication that the relatedness of the predicate offenses was genuinely at issue in any of the cases in which relatedness was *not* independently assessed, and no court of appeals has taken the position that unrelated Title 21 predicate offenses can satisfy Section 848's "continuing series of violations" element. Certainly the Fourth Circuit has not. In *United States* v. *Brown*, 202 F.3d 691 (2000), the case in which the Fourth Circuit first held that *Richardson* errors are subject to harmless-error analysis, the court cited the First Circuit case on which petitioner relies and stated that a *Richardson* error is harmless "if the jury that convicted a defendant on a CCE charge also convicted that defendant of at least three *related* drug violations, and the *related* violations were also alleged to be predicate violations constituting the 'continuing series.'" *Id.* at 699-700 (citing *United States* v. *Escobar-de Jesus*, 187 F.3d 148, 162 (1st Cir.

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[12] See, *e.g.*, *Rivera*, 347 F.3d at 852; *United States* v. *Green*, 293 F.3d 886, 889-890 (5th Cir.), cert. denied, 537 U.S. 965 and 982 (2002), and 538 U.S. 981 (2003); *Santana-Madera*, 260 F.3d at 140-141; *Muse* v. *United States*, 200 F.3d 895, 906 (6th Cir. 2000); *Escobar-de Jesus*, 187 F.3d at 161-162.

[13] See *Muse*, 200 F.3d at 906 (instructional error is harmless if "jury necessarily made factual findings establishing that [the] violations were related to one another"); *Escobar-de Jesus*, 187 F.3d at 162 (noting that evidence introduced to prove predicate offenses, including their "proximity in time and identity in purpose," also "establishes inescapably their relatedness").

1999), cert. denied, 528 U.S. 1176 (2000)) (emphasis added). Subsequently, in *United States* v. *Stitt*, 250 F.3d 878 (2001), cert. denied, 535 U.S. 1074 (2002), the Fourth Circuit found *Brown*'s "relatedness" requirement satisfied where three of the predicate offenses of which the defendant was found guilty were Section 848(e) murders committed in furtherance of the CCE. *Id.* at 884 nn.4-5.

Any "relatedness" challenge to the predicate convictions in this case would likewise fail. As in *Stitt*, the CCE count incorporated by reference the other Title 21 counts charged in the indictment and alleged that those incorporated violations (including the CCE-related murder counts) were "part of a continuing series of violations" for purposes of the CCE offense. C.A. App. 90. And as in *Stitt*, any three of the five predicate offenses of which petitioner was found guilty (a drug conspiracy count, a substantive drug-trafficking count, and three CCE-related murder counts) "are sufficient to constitute the 'three related drug violations' necessary to satisfy the requirements of *Brown*." *Stitt*, 250 F.3d at 884 n.5 (quoting *Brown*, 202 F.3d at 700). See also *Tipton*, 90 F.3d at 887 (noting, on direct review, that the jury instructions required, and the evidence established, a "substantive connection between the murders and the continuing criminal enterprise").

c. Even if the court of appeals' holding that "the trial court's failure to give a *Richardson*-type instruction did not prejudice [petitioner]" (Pet. App. 20a) conflicted with the decision of another court of appeals, this case would not be a suitable vehicle for resolving the conflict. Petitioner forfeited his claim by failing to raise it in the district court, see *Tipton*, 90 F.3d at 885; Pet. App. 19a-20a, and would not be entitled to relief even if

the error were prejudicial. A showing that an error to which there was no objection is "prejudicial," or even that it is "structural," does not, by itself, establish reversible plain error. A defendant must also show that the error was "plain"—*i.e.*, "clear" or "obvious"—at the time of appeal and that it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 466-470 (1997) (internal quotation marks omitted). The error in this case was not plain at the time of petitioner's direct appeal, which antedated *Richardson*, and given that the jury unanimously found petitioner guilty of at least five related predicate CCE violations, it is highly doubtful that the error can be said to have seriously affected the fairness, integrity, or public reputation of judicial proceedings, cf. *United States* v. *Cotton*, 535 U.S. 625, 632-633 (2002); *Johnson*, 520 U.S. at 469-470.[11]

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[11] Although petitioner lists in his questions presented (Pet. i) the question whether a special unanimity instruction is required with respect to the identities of the "five or more other persons" whom he organized, supervised, or otherwise managed during the CCE, 21 U.S.C. 848(c)(2)(A), petitioner presents no argument in support of this claim, and instead incorporates by reference (Pet. 17 n.2) the arguments made in the petitions filed by co-defendants Johnson and Tipton. Unlike his co-defendants, however, petitioner did not raise this claim in the district court (see Pet. App. 84a-90a), and the district court refused to consider claims that were merely adopted by reference (*id.* at 189a). Petitioner also did not raise the claim in the court of appeals (see Pet. C.A. Br. 19-96), which addressed the "five or more other persons" unanimity issue only with respect to petitioner's co-defendants (see Pet. App. 20a-21a). For that reason, as well as the reasons set forth in our brief in opposition to the petitions filed by Johnson and Tipton, see 04-8850 & 04-8856 Br. in Opp. 29-33, certiorari on this claim is unwarranted.

2. Petitioner also contends (Pet. 17-22) that the court of appeals failed to accord proper deference to the district court's factual findings in holding that—contrary to the conclusion of the district court—defense counsel rendered reasonable professional assistance in investigating and presenting a defense to the Moody murder counts. Petitioner is mistaken. Whether counsel's performance was constitutionally reasonable is a mixed question of law and fact, not a purely factual question, and, under the applicable *de novo* standard of review, it was correctly resolved against petitioner by the court of appeals. Further review is therefore unwarranted.

a. Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a defendant raising a Sixth Amendment ineffective-assistance-of-counsel claim must demonstrate both that counsel's performance was so deficient as to fall "below an objective standard of reasonableness" (*id.* at 688) and that, as a result of counsel's unprofessional errors, "there is a reasonable probability that * * * the results of the proceeding would have been different" (*id.* at 694). As *Strickland* makes clear, "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and

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Without specification, petitioner also asserts that he "joins in * * * the remaining contentions raised by Tipton and Johnson." Pet. 17 n.2. But "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court," Sup. Ct. R. 14.1(a), and none of the "remaining contentions raised by Tipton and Johnson" (Pet. 17 n.2) is listed in petitioner's questions presented or fairly included within any question that is. As explained in our brief in opposition to the petitions filed by Johnson and Tipton, moreover, see 04-8850 & 04-8856 Br. in Opp. 14-17, 34-40, there would be no basis for review of these "remaining contentions" (Pet. 17 n.2) even if petitioner had properly presented them.

fact" (*id.* at 698), and thus are subject to *de novo* review. See *Williams* v. *Taylor*, 529 U.S. 362, 400 (2000) (opinion of O'Connor, J.) (*Strickland* claims are subject to plenary review, except where displaced by 28 U.S.C. 2254(d) in habeas corpus cases brought by state prisoners).[15] The court of appeals expressly invoked this standard, stating that it would "review de novo mixed questions of law and fact addressed by the district court—including the issues of whether a lawyer's performance was constitutionally adequate." Pet. App. 13a. And, with respect to the specific ineffective-assistance claim at issue here, the court of appeals said that it would "review de novo the district court's conclusion that Mr. Baugh was constitutionally ineffective," and would "defer to its findings of fact unless they are clearly erroneous." *Id.* at 40a. Petitioner cites no decision that reviewed a lower court's determination on either the performance or the prejudice component of a *Strickland* claim deferentially.

b. Reviewing the district court's decision under the proper standard of review, the court of appeals correctly concluded—contrary to the district court's determination—that defense counsel's investigation of the Moody murder charges was professionally reasonable.

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[15] See also *United States* v. *Harris*, 408 F.3d 186, 189 (5th Cir. 2005) ("Ineffective assistance of counsel is a mixed question of law and fact that this Court reviews de novo."); *United States* v. *Regalos*, 405 F.3d 691, 692-693 (8th Cir. 2005) ("When addressing post-conviction ineffective assistance claims brought under § 2255, we review the ineffective assistance issue *de novo* and the underlying findings of fact for clear error."); *Cooper* v. *United States*, 378 F.3d 638, 640 (7th Cir. 2004) ("The district court's denial of a § 2255 motion for ineffective assistance of counsel is reviewed de novo[.]").

i. This Court has repeatedly stated that "[j]udicial scrutiny of a counsel's performance must be highly deferential" and that "every effort [must] be made to eliminate the distorting effects of hindsight," so that the conduct can be evaluated "from counsel's perspective at the time" and in light of all the circumstances. *Bell* v. *Cone*, 535 U.S. 685, 698 (2002) (quoting *Strickland*, 466 U.S. at 689). The requirement that counsel's performance be scrutinized deferentially is based on the recognition that it is "all too tempting" for a convicted defendant to "second-guess counsel's assistance" and "all too easy" for a court to find an act or omission "unreasonable" because it was "unsuccessful." *Strickland*, 466 U.S. at 689. Accordingly, courts "must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance." *Bell* v. *Cone*, 535 U.S. at 702 (quoting *Strickland*, 466 U.S. at 689).

The same principles apply when the decision at issue is an investigative one. This Court's cases make clear that a pretrial investigation is "measured for 'reasonableness under prevailing professional norms,'" which "includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time,'" *Wiggins* v. *Smith*, 539 U.S. 510, 523 (2003) (quoting *Strickland*, 466 U.S. at 688-689), and that courts must "apply[] a heavy measure of deference to counsel's judgments," *Strickland*, 466 U.S. at 691. That means that, while "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[,] * * * strategic choices made after less than complete investigation are [likewise] reasonable * * * to the extent that reasonable professional judgments support the

limitations on investigation." *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 690-691).

ii. The court of appeals accepted the district court's finding that defense counsel "possessed information suggesting that [petitioner] might be telling the truth about staying at the Howard Johnson hotel the night of Moody's murder." Pet. App. 40a. That information, the court of appeals concluded, gave counsel "reason to believe that the hotel records could generate an alibi [defense]," and, accordingly, "obligated [counsel] to make a reasonable investigation of them." *Ibid.* The court of appeals also accepted the district court's findings regarding counsel's unproductive interview of Carmella Cooley; his requests for motel records pertaining to Linwood Chiles's renting of a room on the night of the Moody murder (January 12, 1992); and counsel's unsuccessful efforts in personally searching the motel's records for a receipt for Linwood Chiles on the night of the Moody murder. *Ibid.* In addition, the court of appeals accepted the district court's findings about the investigation conducted by petitioner's Section 2255 investigator, during which the investigator spent a number of hours searching through motel occupancy records and located a January 2, 1992, receipt for Linwood Chiles and a January 12, 1992, receipt for "Larry Chiles." *Id.* at 11a-12a, 41a.

The court of appeals disagreed only with the district court's conclusion that defense counsel performed deficiently in failing to undertake an investigation of the same breadth as was later conducted by petitioner's Section 2255 investigator. The court of appeals concluded that defense counsel had reasonably confined his search to records for Linwood Chiles for January 12, 1992—the night of the Moody murder, and thus "the

only relevant night" (Pet. App. 42a) (emphasis omitted) —and had reasonably focused his defense on a misidentification theory once his properly focused records search proved unsuccessful. These conclusions are applications of law to fact that are dispositive of the "performance" component of petitioner's *Strickland* claim; the district court's contrary conclusion on the adequacy of counsel's conduct is not a purely factual finding that is entitled to deference. On the contrary, as *Strickland* and the cases that apply it make clear, any deference that was owed was owed to trial counsel. See, *e.g.*, *Bell* v. *Cone*, 535 U.S. at 698, 702; *Strickland*, 466 U.S. at 689-691.

c. Certiorari is also unwarranted because, even if petitioner could show that his counsel performed deficiently, it is unlikely that he could establish a reasonable probability that the result of the trial would have been different. Although it found no need to decide whether petitioner was prejudiced by his counsel's failure to locate the "Larry Chiles" motel record, the court of appeals "express[ed] * * * considerable doubt * * * on whether prejudice could have ensued here." App., *infra*, 2a n.15. There is good reason for such doubt.

As the court of appeals observed, the testimony of the government's three eyewitnesses implicating petitioner in the Moody murder was "credible," with the testimony of the principal eyewitness deemed to be "particularly compelling," and was "corroborated by physical evidence." App., *infra*, 2a n.15. By contrast, the testimony of the potential alibi witnesses, including petitioner himself, was found to be "much less credible." *Ibid.* Indeed, the district court found that Reavis's testimony was "unpersuasive," Pet. App. 52a; that

Rowe's testimony appeared to be "a fabrication," *id.* at 60a; and that petitioner's "self-serving" testimony was not "inherently reliable or trustworthy," *id.* at 61a, particularly since the idea that petitioner spent the night of Moody's murder in a motel with Reavis "does not sit comfortably alongside [his] proven participation" in other murders of his organization's rivals, *id.* at 63a. As the court of appeals observed, moreover, petitioner would have been subjected to "cross-examination about the other murders [he committed] and his extensive criminal record." App., *infra*, 2a-3a n.15. Finally, the alibi defense itself was "a weak one" (Pet. App. 43a), inasmuch as the less-than-credible witnesses, together with a motel receipt in someone else's name, would have placed petitioner "a mere two miles away from the murder scene" (App., *infra*, 3a n.15). Under these circumstances, it is not likely that petitioner would be able to establish a Sixth Amendment violation even if this Court were to conclude that his counsel's performance was unreasonable.

d. Nor is there any reason to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Rompilla* v. *Beard*, 125 S. Ct. 2456 (2005), which was decided after the petition in this case was filed. See Pet. 21-22 (suggesting that petition be held pending decision in *Rompilla*). *Rompilla* "simply applies [this Court's] longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*." 125 S. Ct. at 2469 (O'Connor, J., concurring). Its narrow holding is that, "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available," counsel "is bound to

make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." *Id.* at 2460. This case does not involve a failure to "look at a file [that defense counsel] knows the prosecution will cull for aggravating evidence," much less a file that was "sitting in the trial courthouse, open for the asking." *Id.* at 2467. Instead, the issue in this case is whether counsel performed reasonably when he pursued his investigation of a potential guilt-phase defense to its natural limits and abandoned it only when the investigation failed to unearth the motel record that was the object of the search. The question whether counsel's search for a single record was objectively reasonable under the circumstances is fully informed by *Strickland* and the many cases that apply it; *Rompilla* does not alter the analysis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 03-13, 03-25, 03-26, and 03-27

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JAMES H. ROANE, JR., DEFENDANT-APPELLEE.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JAMES H. ROANE, JR., DEFENDANT-APPELLANT.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

CORY JOHNSON, DEFENDANT-APPELLANT.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RICHARD TIPTON, DEFENDANT-APPELLANT.

Argued: May 6, 2004
Decided: Aug. 9, 2004

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* * * * *

IV.

Finally, we turn to the Government's appeal in No. 03-13, challenging the district court's ruling that Roane's counsel, David Baugh, was constitutionally ineffective for failing to properly investigate Roane's alibi defense for the Moody murder. *See* Roane Opinion at 2-11. The court found that Mr. Baugh's investigation into Roane's potential alibi failed both prongs of *Strickland*, i.e., (1) his performance was deficient, and (2) his deficient performance prejudiced the defense. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Because the district court erred in concluding that Mr. Baugh's representation of Roane was deficient under the first prong of *Strickland*, we reverse its vacatur of Roane's convictions and sentences on Counts Five, Six, and Seven.[15]

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[15] Because Mr. Baugh's performance was not deficient under *Strickland*, we need not decide whether his performance prejudiced the defense. *See Williams v. Kelly*, 816 F.2d 939, 946-47 (4th Cir. 1987). We express our considerable doubt, however, on whether prejudice could have ensued here. The court found the testimony of all three witnesses who implicated Roane in the Moody murder—Berkley, Davis, and Pepsi Greene—to be credible and corroborated by physical evidence. And Greene's testimony was deemed to be "particularly compelling." Roane Opinion at 4. Conversely, the court found the testimony of the potential alibi witnesses to be much less credible—Reavis's testimony was "flat and unpersuasive," and she would not have testified at trial anyway; Roane's testimony was "tenable" but "not compelling"; Rowe's testimony was "not credible" and "would carry no weight with a jury"; and Cooley could not remember the date on which she went to a hotel with Roane. *Id.* at 5-7. It would be difficult for this testimony (not to mention the fact that Roane would have been subject to cross-examination about the other murders and his

The district court concluded that Mr. Baugh had a duty to investigate Roane's potential alibi. As the court explained, Mr. Baugh possessed information suggesting that Roane might be telling the truth about staying at the Howard Johnson hotel the night of Moody's murder—(1) Gina Taylor, an eyewitness, claimed that Roane did not commit the murder; (2) Mr. Baugh had received a detailed account of the alibi from Roane, who had been candid about his participation in other crimes; and (3) Carmella Cooley acknowledged that she had visited a hotel with Roane. *See* Roane Opinion at 9. Armed with this information, we agree that Mr. Baugh had reason to believe that the hotel records could generate an alibi for Roane, and Mr. Baugh was therefore obliged to make a reasonable investigation of them. *See Strickland*, 466 U.S. at 690-91, 104 S. Ct. 2052 (explaining that attorney has duty to make reasonable investigation or to make reasonable decision not to investigate). We part company with the district court, however, on its conclusion that Mr. Baugh failed to fulfill this duty.

We review de novo the district court's conclusion that Mr. Baugh was constitutionally ineffective, *Smith v. Angelone*, 111 F.3d 1126, 1131 (4th Cir. 1997), and we defer to its findings of fact unless they are clearly erroneous. As the district court found, Mr. Baugh, in keeping with his obligation to investigate: (1) interviewed Cooley, who stated that she once accompanied Roane and Reavis to the Howard Johnson but could not

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extensive criminal record), plus one motel receipt, in someone else's name, placing Roane a mere two miles away from the murder scene, to create a reasonable probability that, but for the lack of such evidence, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

verify the date; (2) concluded that Cooley's ignorance of the date and apparent hostility would make her a poor witness; (3) thereafter contacted the Howard Johnson and asked for records of Linwood Chiles renting a room on the evening of January 12, 1992; (4) went to the hotel himself and attempted to locate the records; (5) limited his search to the name "Linwood Chiles," and searched only for records from January 12, 1992; and (6) found no record of Linwood Chiles being registered at the hotel on the evening of January 12, 1992. Roane Opinion at 5. At this point, Mr. Baugh made the strategic choice to focus on Roane's misidentification defense, with Gina Taylor as his lead witness.

The district court concluded that Mr. Baugh's investigation of the alibi was constitutionally insufficient because he "did not follow through and seek the records with the vigor demanded by the situation." *Id.* at 9. According to the court, "reasonably competent counsel would have filed a subpoena demanding all records held by the hotel pertaining to a Mr. Chiles for January of 1992 or spent a few hours going through all the records at the hotel to assure himself that no records corroborative of his client's alibi existed." *Id.* With all respect to the district court, we disagree.

As the Supreme Court has explained, a criminal defense lawyer possesses a duty to conduct a pretrial investigation that is "reasonable[ ] under prevailing professional norms." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052; *see also Wiggins v. Smith*, 539 U.S. 510, 523, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003). And the strategic decision of Roane's lawyer on the extent of his investigation into the alibi defense "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's

judgments." *Strickland*, 466 U.S. at 691, 104 S. Ct. 2052; *see also Byram v. Ozmint*, 339 F.3d 203, 209 (4th Cir. 2003) (same); *Tucker v. Ozmint*, 350 F.3d 433, 441-42 (4th Cir. 2003) (same). We are obligated by law to make "every effort to avoid the distorting effects of hindsight," *Strickland*, 466 U.S. at 689, 104 S. Ct. 2052, and we should evaluate Mr. Baugh's performance "from counsel's perspective at the time of the alleged error and in light of all the circumstances. . . ." *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986).

Applying these principles to this situation, Mr. Baugh's performance was constitutionally reasonable and thorough. He interviewed Carmella Cooley, who could not remember when she stayed at a hotel with Roane. He called the hotel and requested records of Linwood Chiles from the *only relevant night*—the night of the murder. And when that search was not fruitful, he went to the hotel and searched for the records himself. Only after this final step in his investigation did Mr. Baugh turn to and focus on Roane's misidentification defense. In these circumstances, we decline to act as a Monday-morning quarterback and second-guess Mr. Baugh's efforts, simply because we are now armed with more information and the benefit of hindsight.

Furthermore, the authorities relied upon by the district court miss the mark, involving situations in which a lawyer has failed to investigate a defense *at all* or has performed an investigation so minimal that no strategic reason could be given for the failure to investigate further. *See, e.g., United States v. Russell*, 221 F.3d 615, 621 (4th Cir. 2000) (finding ineffective representation when lawyer failed to investigate defendant's criminal record after defendant advised counsel

that his convictions had been overturned); *Hooper v. Garraghty*, 845 F.2d 471, 474-75 (4th Cir. 1988) (explaining counsel deficient in failing to investigate insanity defense, after learning from client, client's family, and prison psychologist of client's insanity); *Hoots v. Allsbrook*, 785 F.2d 1214, 1219-20 (4th Cir. 1986) (finding lawyer's decision not to interview eyewitnesses unreasonable); *Nealy v. Cabana*, 764 F.2d 1173, 1174 (5th Cir. 1985) (finding counsel ineffective in failing to seek evidence from witnesses when client claimed those witnesses committed crime). Unlike the circumstances underlying those decisions, this case does not involve a situation where counsel neglected to investigate, or where his investigation was so cursory that we can now —eleven years on and with the benefit of hindsight— declare it constitutionally unreasonable.

As the Sixth Circuit aptly explained in *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), what the lawyer did not miss is "just as (or more) important as what the lawyer missed." *Id.* at 342. Here, Mr. Baugh was diligent and highly effective in his representation of Roane during this litigation—he conferred with Roane, he investigated the crime scene, he located an eyewitness to the Moody murder who provided a physical description of a murderer dissimilar to Roane, he learned that Moody's mother had advised the police that another man had been searching for Moody hours before his murder, and he aggressively and professionally cross-examined the Government's witnesses. Mr. Baugh investigated the possible Moody alibi—a weak one at that—but when the investigation proved unfruitful, he put on a strong misidentification defense. According a "heavy measure of deference" to Mr. Baugh, as we must, his representation of Roane was not constitutionally ineffective.

We therefore reverse the vacatur of Roane's convictions and sentences on Counts Five, Six, and Seven.

* * * * *

(2)

No. 04-1136

Supreme Court, U.S.
FILED
AUG 10 2005
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IN THE

Supreme Court of the United States

JAMES H. ROANE, JR.
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

No. 04-1136

JAMES H. ROANE, JR.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

The government's brief in opposition for the most part fails to address or misconstrues the arguments in the petition. First, the government fails to explain how the Fourth Circuit's harmless error analysis can be reconciled with this Court's holding in *Richardson* v. *United States*, 526 U.S. 813 (1999). Second, the government's contention that petitioner's *Richardson* claims are procedurally defaulted is incorrect. Third, the government misconceives petitioner's ineffective assistance of counsel claim, and incorrectly asserts that the Fourth Circuit properly deferred to the district court's factual findings.

I. Courts of Appeals Are Divided On The Proper Test To Apply To *Richardson* Errors

A. The Fourth Circuit's Ruling Conflicts With The Decisions Of Other Circuits And Misconstrues *Richardson*

The government does not dispute that, when reviewing a district court's failure to provide a unanimity instruction in violation of *Richardson* for harmlessness, some courts of appeals "have explicitly addressed the 'relatedness' of the predicate offenses" underlying a CCE charge, while others have "*not* independently assessed" whether the predicate offenses were sufficiently related to constitute a "continuing series" under 21 U.S.C. § 848(c). Br. in Opp. 21 (emphasis in original). Nevertheless, the government contends that there is no split in the circuits regarding how harmless error analysis applies to *Richardson* claims because "there is no indication that the relatedness of the predicate offenses was genuinely at issue in any of the cases in which relatedness was *not* independently assessed * * * ." *Id.* at 20-21.

The government, however, cites nothing in those cases suggesting that the relatedness of the individual violations was conceded or otherwise not in dispute. The decisions do not say that relatedness was not at issue or conceded by the parties. Nor do they suggest that the standard they establish, articulate, and apply is limited to cases in which the relatedness issue is conceded. Instead, they articulate and apply a test that omits—as the government concedes—any inquiry into whether the individual violations are related. *Id.* at 21. Simply put, the standard articulated and applied by the Fourth Circuit here (and by the Fifth and Tenth Circuits) does not address the "relatedness" or "series" aspect of Section 848 because the court of appeals assumed that, whenever a defendant was convicted on three or more of the underlying CCE offenses charged in the

indictment, the jury *necessarily* agreed both on the identity of the offenses in the series and that at least three of those offenses were sufficiently related. See Pet. 13-17.

That standard, and the assumption underlying it, is contrary to this Court's decision in *Richardson*. *Richardson's* fundamental holding is that a jury in a Section 848 prosecution "must unanimously agree *not only* that the defendant committed some 'continuing series of violations' *but also* that the defendant committed each of the individual 'violations' necessary to make up that 'continuing series.'" 526 U.S. at 815 (emphasis added). The Court explained that "a jury in a criminal case cannot convict unless it unanimously finds that the government has proved *each* element." *Id.* at 817 (emphasis added). In this context, the "continuing series of violations" required to convict under Section 848 encompasses *two* elements: (1) a "series" of related offenses and (2) the "violations" comprising that series. *Id.* at 817-818. Where the *Richardson* instruction is omitted at trial, the mere fact that a jury returns guilty verdicts on more than three of the predicate offenses charged in the indictment does not guarantee that the jurors also unanimously agreed on *which* three or more crimes were part of the series *or* that those three or more crimes were sufficiently related to constitute the "continuing series."

This Court explicitly recognized as much in *Richardson* itself, explaining that its holding "will make a difference where, as here, the Government introduces evidence that the defendant has committed *more underlying drug crimes than legally necessary* to make up a series." *Id.* at 818 (emphasis added). That makes sense. Where the court fails to provide a *Richardson* instruction, the jury's conviction of the defendant on more than three predicate offenses means only that each juror concluded that *some* of those offenses were sufficiently related. It does not mean that the jury unanimously agreed on *which* predicate offenses were suf-

ficiently related, as required under *Richardson*. The Fourth Circuit's approach (along with that of the Fifth and Tenth Circuits) ignores that distinction, contradicts this Court's observation in *Richardson*, and effectively reads the "continuing series" element out of the statute. In effect, the Fourth Circuit held that *Richardson* makes no difference in cases involving convictions on more than three predicate offenses—precisely opposite the conclusion this Court reached in *Richardson*. The need to ensure faithful adherence to *Richardson*, and the interest of restoring uniformity in circuit law, both weigh heavily in favor of further review.

B. *Richardson* Violations Are Properly Considered Structural Defects

The government relies on prior denials of certiorari and the holdings of other courts of appeals to argue that this Court should not decide the question this Court explicitly reserved in *Richardson*—namely, whether the failure to give a unanimity instruction in a CCE case is a structural defect requiring automatic reversal. *Richardson*, 526 U.S. at 824. But this Court's denial of other petitions for a writ of certiorari raising this issue means only that the Court declined to review those cases; it is hardly precedent that requires denial in all cases raising the same issue in perpetuity. This Court, moreover, often delays review to allow issues to percolate among the lower federal courts, or because particular cases have undesirable features that may be impediments to further review. As this case demonstrates, the courts of appeals continue to overlook the structural significance of *Richardson* error in our system of criminal justice. And this case provides the proper vehicle for review of this important and recurring issue.

C. The Government's Assertion That Petitioner Forfeited His *Richardson* Claim Lacks Merit

The government asserts that, because petitioner forfeited his *Richardson* claim by failing to raise it in the district court during trial, his claim is subject to plain-error review. Br. in Opp. 20. That assertion is incorrect for two reasons and irrelevant for a third. First, to the extent the *Richardson* error is structural, it is not subject to forfeiture. Second, the court of appeals' decision below did not apply a plain-error standard. It simply rejected the claim on the merits. Pet. App. 20a. Nothing requires this Court to review the propriety of that approach; at most, that is an issue for remand.

Third, and most important, the issue in this case—whether the court of appeals applied an incorrect test in evaluating whether *Richardson* error was harmless—is identical whether the *Richardson* error is being reviewed for plain-error or ordinary-error. As explained above, the court of appeals applied an incorrect standard in assessing whether the jury necessarily agreed (or if properly instructed would have agreed) both on the identity of the criminal acts making up the "series" of violations *and* that those criminal acts were sufficiently "related" to constitute a series. The standard the Fourth Circuit applied was incorrect (and conflicts with the approach of other circuits) whether harmlessness is evaluated for purposes of plain-error or ordinary-error. As a result, any dispute over application of the plain- versus ordinary-error standards has no bearing on the propriety of review in this Court.[1]

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[1] The government also asserts that, under the plain error standard, this error does not affect "the integrity or public reputation of judicial proceedings." Br. in Opp. 23. At most, that is an issue for the court of appeals following any remand. In any event, allowing a conviction to stand without the jury or a court having considered *all*

II. This Court Should Clarify The Standard Of Deference Accorded To District Court Factual Findings On Ineffective Assistance Of Counsel Claims

The government misinterprets petitioner's argument with respect to ineffective assistance of counsel. Petitioner acknowledges that whether counsel's performance was constitutionally reasonable is a mixed question of law and fact reviewable under a *de novo* standard. The Fourth Circuit, however, did not accord proper deference to the district court's *factual* findings, which were entitled to deference unless clearly erroneous. The Fourth Circuit's conclusion that defense counsel performed reasonably under the circumstances cannot be sustained under the facts of this case. Particularly given the gravity of the consequences here—the execution of an individual for a murder for which he had a credible alibi that the jury never heard—the ineffective assistance of counsel claim warrants further review.

A. The Fourth Circuit Improperly Invaded The District Court's Province

The Fourth Circuit properly set forth the standard applicable to review of ineffective assistance cases; it would "review de novo the district court's conclusion that Mr. Baugh was constitutionally ineffective," and "defer to its findings of fact unless they [were] clearly erroneous." Pet. App. 40a. But the Fourth Circuit failed to apply that standard to the facts of this case. The district court found that counsel had "substantial information" indicating "that Roane's claim that he was at a hotel at the time of the Moody murder was credible," including (a) an "apparently disinterested" witness who asserted that Roane was not the killer; (b) Roane's "detailed" account that he was miles

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of the elements surely affects the public reputation and integrity of the judicial process—particularly in a capital case.

away in a hotel room at the time of the murder, that Carmela Cooley and Linwood Chiles had driven him to the hotel, and that Chiles had registered and paid cash for the room; (c) Cooley's interview, which "corroborated the details" of Roane's alibi; and (d) Roane's candor with respect to other charges, which "assured counsel that the alibi was true." Pet. App. 55a. The district court also found that, armed with that information, Baugh "had every reason to believe the hotel records would provide objective evidence to corroborate Roane's story." *Ibid.* The Fourth Circuit agreed with those findings, holding that "Mr. Baugh was therefore obliged to make a reasonable investigation" of the hotel records. *Id.* at 40a.

The district court then found that counsel's review of the records was "very limited in scope and duration," despite the lack of any suggestion that "constraints of time or resources played a part in [counsel's] decision to terminat[e] his search for records corroborative of Roane's alibi." *Id.* at 41a, 55a. Without finding clear error in any of those facts, the Fourth Circuit nevertheless concluded that counsel's investigation was reasonable. The court of appeals stated that "defense counsel had reasonably confined his search to records for Linwood Chiles for January 12, 1992—the night of the Moody murder, and thus 'the only relevant night'—and had reasonably focused his defense on a misidentification theory once his properly focused records search was unsuccessful." Br. in Opp. 27-28 (citing and quoting Pet. App. 42a). If true, one of three things follows: (1) Baugh confined his search to January 12, 1992 and failed to uncover the registration card for "Larry Chiles" *on that night*—a card that an investigator would find six years later with minimal effort; (2) Baugh found the registration card, but failed to realize its significance; or (3) Baugh never actually looked at the records for that date. Under either of the first two scenarios, Baugh's conduct falls below the objective reasonableness standard because Roane spe-

cifically told Baugh that Chiles had registered for the hotel room on the night of January 12. Under the final scenario, Baugh's conduct was objectively unreasonable because he failed even to look at that date or to subpoena the hotel records, as the district court found. *Id.* at 56a. The unreasonableness of any of those errors, moreover, is compounded by the fact that the Moody murder—the only one petitioner ever denied committing (and credibly so)—was the *only* capital count for which Roane received the death penalty. Given the seriousness of counsel's error, petitioner's claim warrants review.

B. Petitioner Was Prejudiced

For similar reasons, the government's contention that petitioner cannot demonstrate prejudice is unfounded. The district court—the same district court that observed trial proceedings—specifically found that petitioner in fact was prejudiced by his counsel's inadequate investigation. Pet. App. 57a-59a. In particular, the district court found, as a matter of fact, that had Baugh located the hotel records corroborating Roane's alibi—a registration card for the night of January 12, 1992 under the name "Chiles, Larry," as well as a receipt for that same night indicating that Chiles paid cash for the room—petitioner "would have testified" in his own defense, asserting "that he was at the hotel at the time of the [Moody] murder." *Id.* at 57a. Roane's alibi "would have been somewhat corroborated by the introduction of the hotel records." *Ibid.* When viewed against the government's case, "which was neither undisputed nor overwhelming," and hinged primarily on two eyewitnesses whose testimony was at least partly impeached at trial, the additional evidence was "of sufficient credence to create a reasonable probability that Roane would have been acquitted of the charges related to the murder of Douglas Moody." *Id.* at 58a. That finding is

further supported because the alibi evidence would have bolstered petitioner's misidentification defense. *Ibid.*[2]

C. *Rompilla* Weighs In Favor Of Further Review

Finally, the government argues that this Court's recent decision in *Rompilla* v. *Beard*, 125 S. Ct. 2456 (2005) does not alter the ineffective assistance of counsel analysis. According to the government, this case is unlike *Rompilla* because "[t]his case does not involve a failure to 'look at a file [that defense counsel] knows the prosecution will cull for aggravating evidence,' much less a file that was 'sitting in the trial courthouse, open for the asking.'" Br. in Opp. 30 (citing *Rompilla*, 125 S. Ct. at 2467). But the government overlooks the fact that, like *Rompilla*, the hotel records in this case contained—and defense counsel should have known they would contain—evidence that would support petitioner's defense. And those records were, in fact, "sitting * * * open for the asking," as demonstrated by the district court's factual finding that Baugh could have located the records if he had only "filed a subpoena demanding all records held by the hotel pertaining to a Mr. Chiles for January of 1992 or spent a few hours going through all the records at the hotel to assure himself that no records corroborative of his client's alibi existed." Pet. App. 56a.

"Reasonable efforts certainly included obtaining the * * * readily available" hotel records in this case. *Rompilla*, 125 S. Ct. at 2465. Nevertheless, Baugh conducted only a "very limited" review of the hotel records, despite the fact that neither "constraints of time or resources played a part

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[2] As the government points out in its Brief in Opposition, footnote 15 of the Court of Appeals' decision was inadvertently omitted from the Appendix filed with the Petition For A Writ Of Certiorari. Br. in Opp. 17a n.9. Petitioner apologizes for any inconvenience it has caused, and appreciates the Solicitor General for having included the inadvertent omission in the appendix to its Brief in Opposition.